

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1984

LARRY WITTERS,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,
Respondent.

**On Writ of Certiorari To The
Supreme Court of the State of Washington**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

- I. Does the Establishment Clause prohibit a State from utilizing a vocational rehabilitation program, which meets the federal requirements for such program under 29 U.S.C. §§ 720-722 and applicable federal regulations, to fund the training of a handicapped person for the ministry?
- II. If the Establishment Clause does not impose such a prohibition, does the State's refusal to provide the funding for such training, as required by State constitutional provisions, violate the Free Exercise Clause?

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BRIEF FOR RESPONDENT

CONSTITUTIONAL, STATUTORY AND
REGULATORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions contained at pages 2-3 of Petitioner's Brief, the following provisions are involved.

Washington Constitution, Article I, § 11:

"No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment * * *"

Washington State Constitution, Article IX, § 4:

"All schools maintained or supported wholly or in

part by the public funds shall be forever free from sectarian control or influence."

29 U.S.C. §§ 720-722, which are reproduced as Appendix A.

RCW 74.18.130 which is reproduced as Appendix B.

34 C.F.R. §§ 361.32, 361.33, 361.39, 361.40 and 361.41 which are reproduced as Appendix C.

COUNTERSTATEMENT OF THE CASE

In 1979, petitioner Larry Witters applied to the then Washington State Commission for the Blind for vocational rehabilitation services pursuant to RCW 74.16.181 which, at the time, provided, in part:

"The commission may maintain or cause to be maintained a program of services to assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care. * * * Under such program the commission may;

"* * *

"(3) Provide for special education and/or training in the professions, business or trades under a vocational rehabilitation plan, * * *".¹

An applicant for services from the Commission had to meet the requirements of RCW 74.16.183. Mr. Witters qualified under the requirement that an applicant have "an eye condition of a progressive nature which may lead to blindness."²

¹In 1983 the Washington Legislature repealed chapter 74.16 RCW, abolishing the Commission for the Blind and creating a new state agency, the Department of Services for the Blind. See Washington Laws of 1983, chapter 194, § 3, effective June 30, 1983. The vocational rehabilitative services to be provided by this new department are now found in RCW 74.18.140, which reads in part:

"The department may provide to eligible individuals vocational rehabilitation services, including * * * vocational counseling, guidance, referral, and placement; rehabilitation training; * * * and other goods and services which can be reasonably expected to benefit a client in terms of employability."

²The current eligibility requirements for the program are found in RCW 74.18.130, which reads:

The vocational rehabilitation program at issue is a federally funded program (Pet. App. C-2, J. App. 7). The federal funding is pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*, which provides grants to states "to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

The Commission for the Blind was, and the Department of Services for the Blind now is, the designated state agency eligible to receive funds under this program as applied to the blind. As such it is governed by federal regulations found in 34 C.F.R. part 361. (See relevant portions in App. C.)

Mr. Witters sought assistance from the Commission in order to go to Inland Empire School of the Bible to pursue education and training to become a pastor, missionary or Christian educator (Pet. App. F-2 — F-3).³ The Commission, however, denied his application on the ground that:

"The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in RCW 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability." (Emphasis supplied).

The underlined requirements were new in 1983.

Because of these changes it is unclear whether Mr. Witters is currently eligible for assistance. The Department has had no physical contact with Mr. Witters to determine if these requirements would be met.

³Because of the length of time that this case has been pending, Mr. Witters, at the time of his initial application in 1979, had not entered the school. However, by the time of the entry of the findings of fact, conclusions of law and order in the superior court, May 26, 1982 (Pet. App. C), Mr. Witters had apparently enrolled as a student in the school, originally pursuing a three-year Bible diploma course of study and then switching to the four-year program, which would also lead to a bachelor of arts degree (Pet. App. A-3, C-3). The Department does not know whether Mr. Witters ever completed his course of study.

"* * * the Washington State Constitution forbids the use of public funds to assist an individual in the pursuit of a career or degree in theology or related areas." (J. App. 4).

This was reiterated in the letter of denial dated March 11, 1980 (J. App. 1-2).

No individualized written rehabilitation program was ever created as required by 29 U.S.C. § 722(a) together with 34 C.F.R. § 361.40 and .41. That was so because the decision to deny this specific aid request was made *at the threshold* of a usually very lengthy process of state involvement with a vocational rehabilitation client.

Mr. Witters requested an administrative hearing under the provisions of RCW 74.16.520, which resulted in an initial decision affirming the denial of aid (Pet. App. F.).

Mr. Witters next requested a further review of the initial decision—which was upheld in all respects. (Pet. App. E). An appeal was then taken to the superior court pursuant to the provision of RCW 74.16.530(1). The superior court, after hearings, likewise upheld the Commission's order based upon the provisions of the Washington State Constitution (Pet. App. C and J. App. 7-10), and a further appeal was taken from that decision which was certified to the Washington Supreme Court.

At each stage in the litigation the Commission and its successor continued to base its denial of the application on the State Constitution. Conversely, at no point did either agency contend that a grant of assistance to Mr. Witters would also violate the establishment clause of the First Amendment to the United States Constitution since the state constitutional provisions are more stringent regarding the separation of church and state.⁴

⁴Article I, § 11 of the Washington State Constitution provides, in part:

"No public money * * * shall be * * * applied to any religious * * * instruction, or the support of any religious establishment."

Article IX, § 4 provides:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

The Washington Supreme Court, by a seven to two majority, affirmed the Commission's decision to deny vocational rehabilitation assistance to Mr. Witters. It did so, however—acting on its own motion, so to speak—on the basis of the establishment clause of the First Amendment rather than the above-noted religion clause of the Washington State Constitution (Pet. App. A-2). Applying the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court held that although the first prong (non-sectarian program) was met (Pet. App. A-7), the second prong (primary effect) was not. The court concluded that "the principal or primary effect of the aid sought by [Mr. Witters] would be to advance religion" (Pet. App. A-10). It reached that conclusion by focusing "on the particular aid sought by the [petitioner]" since it was the "only transaction presently before [the court]"—rather than on the vocational rehabilitation program as a whole (Pet. App. A-8). The court did not consider the third prong (excessive entanglement) since it had "held that the aid sought by the [petitioner] would violate the establishment clause because it would have the primary effect of advancing religion" (Pet. App. A-12).

The Washington Supreme Court then, in turn, rejected petitioner's claim that his rights were infringed under the Free Exercise Clause of the First Amendment (Pet. App. A-14 to A-16), but the court did not address his equal protection clause claim since its opinion was not based upon the State Constitution (Pet. App. A-16 — A-17).

SUMMARY OF ARGUMENT

The procedural history just described is the source of several unusual features in this case. The first is the position in which we find ourselves as counsel for the respondent. In the typical establishment clause cases which have reached this Court, the role of the state attorney general has been to defend the constitutionality of the state statute or program under challenge. And that is certainly the role we prefer.

Indeed, as seen from the procedural history, we have

tried from the beginning to have the petitioner's claim decided on the basis of the religion clauses of our State Constitution, rather than the establishment clause. The reason for this effort was that, at least in our view, these state constitutional provisions afforded the simplest and surest grounds for disposing of the petitioner's claim. See, *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1973). As noted by the State Supreme Court in commenting on *Weiss* in the opinion below, " * * * our state constitution requires a far stricter separation of church and state than the federal constitution * * *" (Pet. App. A-2).

This procedural history also explains why the record in this case is much more sparse than in a typical establishment clause case. Under Article I, § 11 of our State Constitution, which prohibits the application of public money " * * * to any religious * * * instruction * * * ", there was only a need to focus upon a fact on which all are agreed, *viz.*, that the petitioner wants the state to pay for his religious training, to fit him to pursue a religious career. Under *Weiss* there was no necessity to examine closely, if at all, the nature and operation of the overall program under which the state was to pay for that training.

Now, however, the nature and operation of that program become critical. And while the record tells us little about that program, various statutes and regulations, especially on the federal level, tell us a great deal. Further, even under a view of this Court's establishment clause decisions which accommodates as much as possible the interests of religious education—a view which we share with the petitioners and the Solicitor General—this particular program presents insuperable problems when applied to the petitioner.

Our disagreement with the briefs of the petitioner, the Solicitor General, and other *amici curiae*,⁵ accordingly, centers more on the relevance than on the accuracy of what they say about this Court's establishment clause decisions.

⁵In this brief, we focus principally on the briefs of the petitioner and the Solicitor General.

For those briefs have overlooked or obscured the decisive factor in this case. They would make it appear that the program under which the petitioner makes his claim is the same, in all essentials, as the "GI Bill" or other federal programs such as "Pell Grants." Indeed, the court below may have also had a similar belief. But in fact the program is radically different from those federal programs; and it is those differences which require affirmance of the court below.⁶

We first examine those differences. The program involved here is a federally assisted vocational rehabilitation program, not a general scholarship or student aid program. Thus the program here necessarily involves the fitting together of three sets of elements, *viz.*, (1) the particular skills and aptitudes of the specific individual, (2) the particular educational program which that individual wishes to enter, and (3) the specific type of job the individual wants. All three sets of elements must be evaluated by a state official in order to determine whether a particular type of job is likely to be available, whether that job fits the particular individual, and whether the specific educational program, including a particular school, is the best one for helping the individual attain that job.

All of these evaluations and judgments must be made by the State before it spends money on a specific individual. Indeed, they are made on a continuing basis, *i.e.*, annually by the State in order to assure that the money is being expended effectively.

A program such as the GI Bill, in contrast, requires none of these sorts of governmental evaluations and judgments. How the money will be expended is determined not by the government, but rather " * * * only as a result of numerous, private choices of individual" citizens. *Mueller*

⁶We thus submit that the court below was right, but for reasons which it failed to articulate fully. This failure may be the source of the concern, particularly on the part of the Solicitor General, over the effect of the decision below on the GI Bill and Pell Grants as applied to ministerial students. That concern, as we shall show, is misplaced. Under our submission, those federal programs are in no jeopardy.

v. Allen, 463 U.S. 388, 399 (1983). Under the GI Bill, or any similar program, the government does not care whether a particular job, or indeed any job at all, will be available after college, or whether any particular school will be best for a particular type of job. And whether the individual's skills and aptitudes fit with a particular course of studies is the concern solely of the individual and the school authorities, not the government. As long as the individual can stay in an accredited school, the government keeps paying until he finishes school or his benefits run out.

To be sure, the government *could* provide a GI Bill type of program for persons who are blind or otherwise vocationally handicapped, and thereby avoid all the evaluations and judgments of the sort involved here. It could say: "What school you choose is none of our concern; and as long as you stay in school, we'll keep paying. Further, what happens to you after school is none of our concern either."

Such a program would, however, undoubtedly be a much more expensive program; and it certainly is not the program in place in the State of Washington and before the Court.

To show the types of evaluations and judgments which the State must make, we will review the various federal statutes which establish the conditions for federal assistance for the program, and the federal regulations under which it the program is operated. These statutes and regulations clearly show the government involvement and supervision in every step of the decision-making process, a process in which government choices and private choices are inextricably intertwined.

After our review of these statutes and regulations, we will turn to the recent decisions of this Court which apply the three-prong test established in *Lemon v. Kurtzman*, 403 U.S. at 612-613. Under those decisions, this intertwining of government and private choices which is inherent in the program prevents that program from being used to fund studies for the ministry. This is because of the second

and third prongs of that test, *viz.*, the "effect" prong and the "entanglement" prong.

Again, the contrast between a "GI Bill" type of program and this vocational rehabilitation program illustrates our point. Under the former type of program, there is no danger of a "symbolic union" of government and religious activities and no "imprimatur of state approval on religious sects and practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), quoted in *Grand Rapids School District v. Ball*, No. 83-990 (July 1, 1985), slip. op. at 16. Not so here, however. Further, there is in a GI Bill type of program no appreciable danger of entanglement between governmental and religious activities; here, however, such entanglement " * * * inheres in the situation." *Lemon v. Kurtzman*, 403 U.S. at 617, quoted in *Grand Rapids School District, supra*, slip. op. at 13. Far from just a danger of entanglement, we here have a certainty if the program operates as it is designed. Nor is there any way, administratively, to operate the program in a manner which both avoids the entanglement and still complies with the federal requirements.

The nature of the entanglement present here is admittedly somewhat different from that involved in *Lemon* and in such cases as *Aguilar v. Felton*, No. 84-237 (July 1, 1985). In those cases the entanglement arose because of the continuing supervision necessary to assure that the state aid was not used for religious purposes, and that the second prong of the *Lemon* test was thus not violated. Here, the continuing state supervision serves a function which, while different, makes the entanglement problem even more aggravated than in those cases; its function is not to keep religious and secular training separate, but to make sure that a program of religious training is being carried out in a manner, and with results, acceptable to the State.

We will then conclude with a word on the free exercise issue. The decision of the court below is consistent with the free exercise clause for the same reason that the decisions of this Court such as *Lemon, supra*, and *Grand Rapids* are consistent with that clause. That is, the free

exercise clause does not make constitutionally valid those state programs and administrative actions which are invalid under the establishment clause. There is, we would agree, a tension between the two clauses, a tension which indeed is present in this case. That tension, however, does not make the establishment clause any less applicable than it was in *Lemon, Grand Rapids*, and similar decisions of this Court.

ARGUMENT

I.

The Establishment Clause Prevents a State From Funding the Education of a Ministerial Student Under a Vocational Rehabilitation Program Which Requires That the State Evaluate and Determine the Suitability of the Individual Student for a Religious Career, the Availability of Employment in That Career, and the Suitability of a Specific Education Program for That Career.

A. Nature of the Vocational Rehabilitation Program for the Blind.

The nature of the program here involved can perhaps be best seen by comparing it with other types of educational programs found on the federal level, the most familiar of which is the "GI Bill." See, 38 U.S.C. §§ 1500-1521, 1601-1643, 1651-1693, and 1700-1766. The "GI Bill" and other similar federal programs are fully described by the Solicitor General in his *amicus* brief, pp. 2-4. As that description shows, such programs have two important characteristics. First, they do not exclude ministerial students from their scope. Secondly, the hand of the government is not intrusive at all; on the contrary, a "hands off" policy on the part of the government is embedded in these programs.⁷ The school which the student wishes to attend

⁷Our basic submission in this case can be summarized in terms of these two features: any program of educational aid which does not fully incorporate a "hands off" policy cannot include aid for ministerial studies.

must be accredited by a recognized national or state accrediting agency. Beyond that, all choices are those of the student and the school. The government does not care, and cannot control, which type of career the student might seek, or indeed, whether the student has a career goal at all. If the student wishes to take a degree in theology, simply because he is interested in theology, and then to become a baseball player, rather than a minister, that is of no concern to the government. Nor is it the government's concern whether the student is suited for a particular career, be it in baseball, religion or anything else. If he happens to choose to pursue a religious career, and attend a seminary for the necessary training, his suitability for that career will be determined by seminary or other church authorities, not by the government. Further, if the student chooses a school to obtain training in a career choice for which there are no opportunities in the job market, that too is of no concern to the government.

While a "GI Bill" type of program embodies a "hands off" policy, the vocational rehabilitation program embodies quite the opposite, *viz.*, a "hands on" policy which permeates the whole program. And this policy is traceable, we suggest, to the federal statutes and regulations which authorize federal financial assistance for the program and establish the requirements which the state must meet in order to obtain such assistance. We thus begin our examination of the nature of the program with a look at these statutes and regulations.

The federal assistance is provided pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.* Section 720(a) provides:

"The purpose of this title is to authorize grants to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities."

The goal is gainful employment; but that employment, and the training necessary to attain that employment are to be matched to the needs and capabilities of the

individual. This matching function for a specific individual becomes even more prominent in subsequent statutory provisions.

Thus, § 721 establishes the requirements for state plans which are eligible for the federal assistance. Among other requirements, the state plan must provide that an "individualized written rehabilitation program * * * will be developed for each handicapped individual * * *" Section 721(a)(9). Section 722, in turn, spells out what the individualized rehabilitation program must contain, and how it is to be administered.

"* * * The Commissioner [of the federal Rehabilitation Services Administration] shall insure that the individualized written rehabilitation program, * * * in the case of each handicapped individual is developed jointly by the vocational rehabilitation counselor or coordinator and the handicapped individual (or, in appropriate cases, his parents or guardians), and that such programs meets the requirements set forth in subsection (b) of this section. * * *" § 722(a). (Emphasis supplied)

Section 722(b) provides in pertinent part:

"Each individualized written rehabilitation program shall be *reviewed on an annual basis* at which time each such individual (or, in appropriate cases, his parents or guardians) will be afforded an opportunity to review such program and jointly redevelop and agree to its terms. Such program shall include, but not be limited to (1) a statement of *long-range rehabilitation goals for the individual and intermediate rehabilitation objectives related to the attainment of such goals*, (2) a statement of the specific vocational rehabilitation services to be provided, (3) the projected date for the initiation and the anticipated duration of each such service, (4) objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, * * *" (Emphasis supplied)

Section 722(c) provides in pertinent part:

"The Commissioner shall also insure that (1) in making any determination of ineligibility referred to in subsection (a) of this section, or in developing and

*carrying out the individualized written rehabilitation program required by section 101 [29 U.S.C. § 721] in the case of each handicapped individual, emphasis is placed upon the determination and achievement of a vocational goal for such individual, (2) a decision that such an individual is not capable of achieving such a goal and thus not eligible for vocational rehabilitation services provided with assistance under this part [29 U.S.C. §§ 720, et seq.], is made only in full consultation with such individual (or, in appropriate cases, his parents or guardians), and only upon the certification, as an amendment to such written program, or as a part of the specification of reasons for an ineligibility determination, as appropriate, that the preliminary diagnosis or evaluation of rehabilitation potential, as appropriate, has demonstrated that such individual is not then capable of achieving such a goal, * * *" (Emphasis supplied)*

Under § 722(a)-(c), quoted above, joint agreement by the individual client and his counselor is contemplated for every step in the development and implementation of the individualized rehabilitation plan. But if the client disagrees with a decision of his counselor, a government official, either state or federal, has the final word. See, § 722(d) entitled, "Review by Director of determinations by rehabilitation counselors or coordinator; review of final decision of Director by Commissioner."

Under § 722 then, all decisions and determinations ultimately rest with the government. But § 722 does assure that the individual has input into the decision-making process. As stated in the Senate Report on the Rehabilitation Act of 1973:

"After hearing extensive testimony and reviewing the data supplied to the Committee by the Department of Health, Education, and Welfare, it became apparent that the individual client was not being sufficiently consulted on his own behalf in tailoring the rehabilitation program to his individual needs. This concern led to the adoption in section 102 of the bill [29 U.S.C. § 722] of the formal written rehabilitation program requirement for every individual who is served under the vocational rehabilitation program.

"* * *

"It is the purpose of the Committee, in requiring an individualized written rehabilitation program, to assure that each handicapped individual has an opportunity to participate in the decisionmaking regarding services he is or is not to receive; to have a written understanding that specifies the services to be provided and the objectives they are to achieve; to be able to obtain information on the progress he is making with regard to the objectives of the program; and to rewrite jointly with the rehabilitation agency the program when it is apparent that the stated objectives cannot be achieved. * * *" S. Rep. No. 93-318, 93rd Cong., 1st. Sess. 24 (1973). (Emphasis supplied)

One additional feature of the federal system should be noted. The regulations require the state to provide two types of diagnostic studies for the individual. The first is called the "preliminary diagnostic study," and the determinations to be made under that study are the following:

"(1) Whether the individual has a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment; and

"(2) Whether vocational rehabilitation services may reasonably be expected to benefit the individual in terms of employability, or whether an extended evaluation or vocational rehabilitation potential is necessary to make this determination." 34 C.F.R. § 361.32(a)(1)-(2). (Emphasis supplied)

At this juncture, the second determination is the important one. That determination requires, among other things, consideration of "employability," which, as defined in the regulations,

"* * * refers to a determination that the provision of vocational rehabilitation services is likely to enable an individual to enter or retain employment consistent with his capacities and abilities in the competitive labor market; the practice of a profession; self-employment; homemaking; farm or family work (including work for which payment is in kind rather than in cash); sheltered employment; homebound employment; or other gainful work." 34 C.F.R. § 361.1(c)(2). (Emphasis supplied)

If this preliminary diagnostic study determines that vocational rehabilitation services will benefit the individual in terms of "employability," then a further diagnostic study is to be made, termed a "thorough diagnostic study," which apparently serves as the basis for the individualized rehabilitation plan required by 29 U.S.C. § 722. The scope of that study

"* * * includes in all cases to the degree needed, *an appraisal of the individual's personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment, employment opportunities, and other pertinent data* helpful in determining the nature and scope of services needed. The study also includes, as appropriate for each individual, *an appraisal of the individual's patterns of work behavior, ability to acquire occupational skill and capacity for successful job performance.*" 34 C.F.R. § 361.33(b). (Emphasis supplied)

Such is the federal system under which the state must operate its program for the blind.⁸ How would the system operate in the case of a disabled person, such as the petitioner, who wishes to attend a training program for the ministry? What sorts of evaluations must the counselor or other state official make under the "preliminary" and subsequent "thorough" diagnosis? And what sorts of decisions must be made in formulating individualized written rehabilitation program?

Obviously, the individuals' aptitudes for the ministry must be evaluated. This evaluation would necessarily include the individual's "personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment * * *" insofar as they might make him fit or unfit for the ministry. 34 C.F.R. § 361.33(b). And this would necessarily include an evalua-

⁸The implementing regulations on the state level follow the pattern of individualized diagnosis and evaluation established in the federal statutes and regulations. See Wash. Admin. Code ch. 67-25. These federal statutes and regulations, we should note, cover not just programs for the blind, but all federally assisted programs under the Rehabilitation Act of 1973, 29 U.S.C. § 720, *et seq.*

tion of what characteristics should be found in a successful minister. Further, an evaluation must be made of "employment opportunities." *Id.* In other words, there must be an evaluation of the market for ministers in the particular denomination with which the individual wishes to be affiliated. (The possibility of no denominational affiliation, of course, may exist; but that market too would have to be evaluated if the individual wished to be such a minister.)

If these evaluations are positive, then the right training program must be determined, so that it can be incorporated into the individualized written rehabilitation program required under § 722. This would require an evaluation of the training provided (e.g., at the Inland Empire School of the Bible or Whitworth College) to assure that the individual will be prepared for the particular type of ministry which is his vocational goal. Is the training at these schools adequate? Is better training available elsewhere? If so, where? And how is it better? These are the sorts of questions the state must answer.⁹

Evaluations of this sort are not just likely, but indeed cannot be avoided under the system we are dealing with here. Yet, it is difficult to imagine evaluations which are more at odds with the values embodied in the establishment clause as construed by the decisions of this Court.

B. Under the Second Prong of the Lemon Test, the Vocational Rehabilitation Program Cannot be Used to Fund the Training of Ministerial Students.

While we believe the court below was correct in denying the petitioner relief on the basis of the second prong of the *Lemon* test, *viz.*, the "effect" prong, we differ with that

⁹The petitioner's failure to comprehend the nature of the program is strikingly shown by the following passage in his brief:

"The choices as to which school to attend and which career to pursue are entirely up to the blind individual. No agency of the state has the power to influence the choice. * * *" Pet. Br. at page 20.

Both statements are absolutely incorrect.

court as to the proper approach which should be taken in applying the prong.

As correctly pointed out by both the petitioner and the Solicitor General, the court below focused solely on the specific financial aid to the petitioner for funding his ministerial studies. It did not consider the nature of the overall program under which that aid was to be provided. Pet. Br. 29-34, U.S. Br. 23-27. But these criticisms, though not without force, should not change the result in this case. For the nature of the overall program here involved requires rejection, not acceptance, of the petitioner's claim. To show why this is so, we must first examine more closely the second prong, as applied in cases subsequent to *Lemon*.

Though cast in terms of "principal or primary effect," *Lemon*, 403 U.S. at 612, this way of describing that prong has become something of a misnomer. As noted by one commentator:

" * * * [W]hile retaining the earlier label, the Court has transformed it [the second prong] into a *requirement that any non-secular effect be remote, indirect and incidental*. This shift is significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist no-aid approach to the establishment clause than the primary effect test did." (Emphasis in original) Tribe, *American Constitutional Law* (1978), p. 840.

Thus, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court, in invalidating a state tuition supplement program for private schools, declined to determine whether the aid to parochial schools which resulted from that program was "primary" or "secondary," rejecting the proposition that "such metaphysical judgments are either possible or necessary * * *" 413 U.S. 756, 783-84, n. 39. As further stated in *Nyquist*:

" * * * 'Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.' * * *" *Id.*

But how does one distinguish a "direct and immediate effect," from an indirect, remote, and incidental effect? Are such judgments any less "metaphysical" and any more "possible" than judgments as to what is "primary" and what is "secondary"?

Mueller v. Allen, 463 U.S. 388 (1983), we believe, sheds light on these questions, and shows what is really at the core of the second prong of the *Lemon* test. *Mueller* involved a state program under which parents could deduct for state income tax purposes their expenditures for tuition and other school costs. Though parents of parochial school children were the primary beneficiaries of the program, in terms of numbers, the program applied to all parents of school children, whether the children were in private or public schools. From the point of view of the parents of parochial school children who had enough income to receive financial benefit from the tax deductions, the program itself was hardly distinguishable from that invalidated in *Nyquist*. Yet the court upheld it, as applied to such parents, even while recognizing that this sort of aid to the parents " * * * ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." *Mueller*, 463 U.S. at 399.

The court went on to say:

"Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' * * * can be deemed to have been conferred on any particular religion, or on religion generally." *Id.*

Thus, one of the important elements at the core of the second prong is the element of symbolism. Will the program in question be perceived as conferring any "imprimatur of state approval" on any particular religion or on religion generally? If so, the effect of aiding religion will be found to be direct and immediate, and thus violative of the second prong, rather than indirect and incidental.¹⁰

¹⁰For a discussion of the importance of symbolism in applying the second prong, see Tribe, *op. cit.*, pp. 843-845. This importance has been expressly recognized in the more recent decisions of this court, as shown

There are, to be sure, methods by which a government can provide financial assistance for a religious education while still avoiding the fatal symbolism. That financial assistance can even be for ministerial studies. And in suggesting otherwise, the court below erred. The GI Bill and the system of tax deductions involved in *Mueller* are examples of such methods.¹¹

But under both of those methods the precise use of the financial assistance is determined " * * * only as a result of numerous, private choices of individual" citizens. *Mueller*, 463 U.S. at 399. That factor, along with their broad base of beneficiaries — who are determined without regard to any criteria having to do with religion — removes

by *Grand Rapids District, et al. v. Ball*, No. 83-990 (July 1, 1985), slip. op. 16-17;

" * * * As we stated in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126 (1984): '[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.' See also *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (finding effect 'incidental' and not 'primary' because it 'does not confer any imprimatur of state approval on religious sects or practices').

"It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. * * *

"The difference in symbolic impact helps to explain the difference between the cases. The symbolic connection of church and state in the *McCollum [v. Board of Education*, 333 U.S. 203 (1948)] program presented the students with a graphic symbol of the 'concert or union or dependency' of church and state, see *Zorach, [v. Clau- son*, 343 U.S. 306 (1952)] *supra*, at 312. This very symbolic union was conspicuously absent in the *Zorach* program." [footnote omitted]

¹¹So too are the financial aid systems for college students upheld in *Durham v. McCloud*, 259 S.C. 409, 192 S.E.2d 202 (1972), *app. dismissed* 413 U.S. 902 (1973) and *Americans United v. Blanton*, 433 F.Supp. 97 (M.D. Tenn.) *aff'd per curiam* 434 U.S. 803 (1977).

from those two methods the fatal symbolism, and makes the aid to religion indirect and incidental.¹²

The vocational rehabilitation program involved here, we agree, also has a broad base. This feature, which is strongly emphasized by the petitioners and the Solicitor General, certainly cuts in favor of the program's constitutionality. But unlike the GI Bill and the program involved in *Mueller*, the program here requires government choices at every step of the rehabilitation process. And this further feature, we submit, overwhelms the effect of the first, and brings about the forbidden symbolic union.

In short, the court below was wrong in stating flatly and unqualifiedly: "It is not the role of the state to pay for the religious education of future ministers;" (Pet. App. A-10) this error, however, was not fatal to the court's result. For if the state takes on not only this role, but also the role of determining whether a person should be a minister at all, what his chances for success as a minister might be, and what sort of training and what specific school are appropriate for a particular type of ministry, then the state has indeed taken on a forbidden role. The determinative factor is the "* * * cumulative impact of the entire relationship * * *" arising because of these roles. *Lemon*, 403 U.S. at 614. And these roles do not become permissible simply because they are taken on as part of a broadly based program of assistance to handicapped persons generally.

It is this intertwining of governmental decisionmaking so closely with decisionmaking by church and school authorities, combined with the fact of state aid for ministe-

¹²Although our discussion has focused on the similarities between the GI Bill and the program involved in *Mueller*, there are certainly differences between these two types of programs. Benefits under the GI Bill are, in a sense, "earned" by the veteran, and can be looked upon as a type of deferred compensation, while the tax benefits in *Mueller* cannot. In terms of symbolism, this makes the case for the validity of the GI Bill, as applied to religious studies, even stronger. On the other hand, the provision of aid for *ministerial* studies, which can occur under the GI Bill, certainly raises, again in terms of symbolism, a more serious question than would provision of aid for general tuition in a religiously oriented school, as in *Mueller*.

rial studies, which forms the symbolic union. The program at issue here makes this intertwining inevitable if the state is to provide aid for such studies.

C. Under the Third Prong of the Lemon Test, the Vocational Rehabilitation Program Cannot be Used to Fund the Training of Ministerial Students.

The third, or "excessive entanglement," prong of the *Lemon* test was not considered by the court below, which found it "* * * ill suited to this case," impossible to apply because of the scanty record, and unnecessary to apply because of the court's conclusion under the second prong (Pet. App. A-12).

We believe, however, that the third prong should be considered and that it provides an additional ground for affirming the decision of the court below. Because the court below did not consider that prong, it thus did not look closely at the overall nature of the program, as established by the federal statutes and regulations. Had it focused on these statutes and regulations, however, the third prong problem would have become obvious.

The court below was correct in noting that the factual situation in *Lemon* was quite different from the factual situation here (Pet. App. A-11 — A-12). This factual difference makes the role of the third prong here somewhat different from its role in *Lemon*; but it no less important.

In *Lemon*, the relationship between the second and third prongs was roughly the relationship between the proverbial frying pan and the fire. In trying to separate out sectarian instruction from the secular in order to avoid funding the former and thereby avoid the second prong, one runs up against the third prong; for this very effort in marking the separation constitutes excessive entanglement, at least in the context of elementary and secondary schools. Compare, *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) and *Aguilar v. Felton*, No. 84-237 (July 1, 1985). The second and third prongs together create a type of "Catch-22," to use the phrase of Mr. Justice Rehnquist's

dissent in *Aguilar*, *supra*, slip op. 1 (Rehnquist, J., dissenting).

Here, however, there is no effort to separate out the religious instruction from the secular; presumably all of the instruction which the petitioner wishes to receive will be religious in nature or orientation, since all of that instruction will be designed to train him for the ministry.

In this context, the second and third prongs each provide a different lens for examining the same factual situation;¹³ and each emphasizes somewhat different establishment clause constitutional values which are impaired by that factual situation. The second prong, with its emphasis upon avoidance of any "symbolic union" of governmental and religious functions, focuses upon the message sent to the public. Will adherents perceive an endorsement and nonadherents see disapproval of their individual religious choices? See *Grand Rapids School Dist. v. Ball*, *supra*, slip. op. 16. The third prong focuses upon the danger to the religious freedom of the adherents and the institutions to which they adhere arising from the excessive administrative entanglement by the government.

The nature and degree of that administrative entanglement should, by now, be clear in this case; and we need describe it no further. Instead, we merely note that it is, like the entanglement in *Lemon*, one which arises from "[a] comprehensive, discriminating, and continuing state surveillance * * *"¹⁴ 403 U.S. at 619.

In *Lemon*, the surveillance was primarily over the teachers; here it is primarily over the student — though certainly with one eye on the teachers to assure that they are meeting the student's needs as determined by the rehabilitation counselor. But that does not make it any less comprehensive, discriminating, and continuing, nor any less intrusive into areas of great religious sensitivity.

¹³In this respect, this case is similar to *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which the Court invalidated a Massachusetts statute prohibiting the grant of a liquor license to an establishment located within 500 feet of a church if the church objected. The Court found this law invalid under both the second and third prongs. See 459 U.S. at 126,127.

Is there any way to avoid this surveillance and intrusion? The only possibility for doing so which we can envision would be to adopt a "hands-off" policy similar to that embodied in the GI Bill. Whether an individual should be a minister, and what sort of training he should receive would be left to the decisions of church and school authorities, not the government. The problem, however, is that there is no room for such a policy within the federal statutes and regulations here involved. See pp. 10-16, *supra*. Further, even if such a policy were legally possible, and were adopted by the state agency administering the vocational rehabilitation program, there is no assurance that it could be successfully implemented on the lower levels, e.g., on the level of the individual counselor.¹⁴

In short, the problem of administrative entanglement is impossible of solution in any manner other than the one we here urge: *viz.*, not allowing the vocational rehabilitation program to be used for the funding of ministerial training at all.

II.

Denial of Funding for Ministerial Training Under the Vocational Rehabilitation Program Does Not Result in a Denial of Petitioner's Rights Under the Freedom of Religion Clause.

While the petitioner and the Solicitor General both argue that the court below should be reversed on the establishment clause issue, they disagree as to what the next step should be in the disposition of this case. The petitioner urges the Court to go on to consider the free exercise issue (Pet. Br. 40-49). The Solicitor General suggests that the Court not do so, but instead leave that issue for the court below to deal with on remand (U.S. Br. 27-29).

The solution to this problem will depend, to a large extent, on how the establishment clause issue is resolved.

¹⁴In this respect, we would then have both the "frying pan" and the "fire," as in *Lemon* and *Aguilar*.

If our submission on that issue is correct, the free exercise issue is thereby disposed of as well. For the free exercise clause cannot here validate a government program or action that is otherwise invalid under the establishment clause. There can be little doubt, for example, that such decisions as *Lemon*, *Nyquist*, *Grand Rapids*, and *Aguilar*, produce a severe practical restriction on the freedom of choice for parents, especially poor parents, to follow their religious convictions by sending their children to parochial schools. But surely the free exercise clause is not thereby violated. So too here.

If, however, the petitioner and the Solicitor General are correct on the establishment clause issue, the problem becomes less simple. If the religion clauses of our State Constitution were not independent obstacles to granting the petitioner the funding he wants, no free exercise issue would then even arise. The free exercise clause comes into play only where there is some prohibition against that funding in a statute or a state constitutional provision. It is clear that there are no such statutory prohibitions, state or federal. We believe, however, that the prohibitions exist in the religion clauses of the State Constitution, as discussed at pp. 5-6, *supra*, and these are the source of the problem.¹⁵

Let us be more specific: Should this Court determine that the court below erred in finding a violation of the establishment clause and remand this case to the court below that court, we fully expect, would follow *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1984). That is, it would find a violation of the religion clauses of the State Constitution which, as the same lower court noted in its opinion in this case, “* * * requires a far stricter separation of church and state than the federal constitution * * *” (Pet. App. A-2). In turn, the petitioner, in those

proceedings on remand, would inevitably raise once again the free exercise issue, and the court below would be squarely faced with it. A ruling by this Court on that issue would thus facilitate a final disposition of this case, and thereby obviate the need for returning to this Court again.

For this reason, while recognizing the force of the Solicitor General’s suggestion that the free exercise issue not be considered, we urge the Court to resolve that issue as well if it resolves the establishment clause issue in favor of the petitioner. Accordingly, some additional discussion of the free exercise issue is appropriate.

The free exercise clause would, of course, be violated by an actual prohibition of religious schools; but governmental inability to prohibit is far different from a governmental duty to fund. As stated in *Harris v. McRae*, 448 U.S. 297 (1980), in upholding the validity of the “Hyde Amendment,” which prohibited payment of federal medical aid funds for certain types of abortions:

“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, * * * or prevent parents from sending their child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510, * * * government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. [Footnote omitted] Whether

¹⁵The petitioner seems to suggest that the source of the problem is an arbitrary bureaucracy which “meddle[d]” in questions that are none of its businesses. Pet. Br. 43. We can only recommend that he read once again *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973 (1984), and the comment on that case in the opinion below. (Pet. App. A-2).

freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. * * * 448 U.S. at 317-318.

Here too, the petitioner would translate a limitation on government power into an affirmative funding obligation and effectively deny to the state any room for choice in determining the limits of what it will fund.¹⁶

This is not to suggest that the free exercise clause has no role at all to play in funding programs such as that involved here. If the program in *Mueller* had excluded from its scope tuition payments which parents made to Catholic schools, while allowing the deduction of tuition payments to all other types of parochial schools, that surely would have violated the free exercise clause. So, too, if the GI Bill permitted payment of tuition for all seminary students except Lutherans or Episcopalians. But there is, of course, no similar situation here.

Nor is the situation here similar to that in *Widmar v. Vincent*, 454 U.S. 263 (1982) or *McDaniel v. Patty*, 435 U.S. 618 (1978). In *Widmar*, a group of students were being denied the right of free speech on public university facilities because of the religious content of that speech, while all other groups — over 100 in all — were granted free access to those facilities. Conversely, however, Mr. Witters' right to free speech, including religious speech, is in no way involved here.

In *McDaniel*, a minister was denied the right to hold public office, simply because he was a minister. But surely the right to hold public office, along with all other citizens, is much more fundamental than the right to have the public pay for one's special education.

CONCLUSION

For the reasons given above, the decision below should be affirmed. If it is not affirmed, the free exercise issue should be resolved in favor of respondent and the case then remanded to the Washington Supreme Court for further proceedings.

Respectfully submitted,

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¹⁶The position of the petitioner seems to be that whatever the state may fund, consistent with the establishment clause, it *must* fund — in order to avoid a violation of the free exercise clause. More generally, the free exercise clause would prohibit a state from being more strict in the matter of separation of church and state than is required by the establishment clause. We believe this position is entirely too rigid.

**APPENDIX A
29 U.S.C. §§ 720-722**

§ 720. Federal grants

(a) Congressional declaration of purpose. The purpose of this title is to authorize grants to assist States to meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities.

§ 721. State Plans

(a) Three year plan; annual revisions; general and specific requirements. In order to be eligible to participate in programs under this title, a State shall submit to the Commissioner a State plan for vocational rehabilitation services for a three-year period and, upon request of the Commissioner, shall make such annual revisions in the plan as may be necessary. Each such plan shall—

(9) Individualized written rehabilitation program.

provide that (A) an individualized written rehabilitation program meeting the requirements of section 102 [29 USC § 722] will be developed for each handicapped individual eligible for vocational rehabilitation services under this Act, (B) such services will be provided under the plan in accordance with such program, and (C) records of the characteristics of each applicant will be kept specifying, as to those individuals who apply for services under this title and are determined not to be eligible therefor, the reasons for such determinations in such detail as required by the Commissioner in order for him to analyze and evaluate annually the reasons for and numbers of such ineligibility determinations as part of his responsibilities under sec-

tion 13 [29 USC § 712], and that the State agency will at least annually categorize and analyze such reasons and numbers and report this information to the Commissioner and will, not later than 12 months after each such determination, review each such ineligibility determination in accordance with the criteria set forth in section 102 [29 USC § 722];

§ 722. Individualized written rehabilitation program

(a) Joint development by counselor or coordinator and handicapped individual; goods and services for handicapped individual; terms and conditions, rights and remedies. The Commissioner shall insure that the individualized written rehabilitation program, or the specification of reasons for a determination of ineligibility prior to initiation of such program based on preliminary diagnosis, required by section 101(a)(9) [29 USC § 721(a)(9)] in the case of each handicapped individual is developed jointly by the vocational rehabilitation counselor or coordinator and the handicapped individual (or, in appropriate cases, his parents or guardians), and that such programs meets the requirements set forth in subsection (b) of this section. Such written program shall set forth the terms and conditions, as well as the rights and remedies, under which goods and services will be provided to the individual, and, as appropriate, such specification of reasons for such an ineligibility determination shall set forth the rights and remedies, including recourse to the process set forth in subsection (b)(5) of this section, available to the individual in question.

(b) Annual review; joint redevelopment and agreement of terms; scope of program. Each individualized written rehabilitation program shall be reviewed on an annual basis at which time each such individual (or, in appropriate cases, his parents or guardians) will be afforded an opportunity to review such pro-

gram and jointly ~~redevelop~~ and agree to its terms. Such program shall include, but not be limited to (1) a statement of long-range rehabilitation goals for the individual and intermediate rehabilitation objectives related to the attainment of such goals, (2) a statement of the specific vocational rehabilitation services to be provided, (3) the projected date for the initiation and the anticipated duration of each such service, (4) objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, and, (5) where appropriate, a detailed explanation of the availability of a client assistance project established in such area pursuant to section 112 [29 USC § 732].

(c) Determination and achievement of vocational goal; decision respecting potential and capability of achievement; annual review of decision. The Commissioner shall also insure that (1) in making any determination of ineligibility referred to in subsection (a) of this section, or in developing and carrying out the individualized written rehabilitation program required by section 101 [29 USC § 721] in the case of each handicapped individual, emphasis is placed upon the determination and achievement of a vocational goal for such individual, (2) a decision that such an individual is not capable of achieving such a goal and thus not eligible for vocational rehabilitation services provided with assistance under this part [29 USC §§ 720 et seq.], is made only in full consultation with such individual (or, in appropriate cases, his parents or guardians), and only upon the certification, as an amendment to such written program, or as a part of the specification of reasons for an ineligibility determination, as appropriate, that the preliminary diagnosis or evaluation of rehabilitation potential, as appropriate, has demonstrated beyond any reasonable doubt that such individual is not then capable of achieving such a goal, and (3) any such decision, as an amendment to such written program, shall be reviewed at least annually in accordance with the procedure and criteria established in this section.

(d) Review by Director of determinations by rehabilitation counselor or coordinator; review of final decision of Director by Commissioner.

(1) The Director of any designated State unit shall establish procedures for the review of determinations made by the rehabilitation counselor or coordinator under this section, upon the request of a handicapped individual (or, in appropriate cases, his parents or guardians). Such procedures shall include a requirement that the final decision concerning the review of any such determination be made in writing by the Director. The Director may not delegate his responsibility to make any such final decision to any other officer or employee of the designated State unit.

(2) Any handicapped individual (or, in appropriate cases, his parent or guardian) who is not satisfied with the final decision made under paragraph (1) by the Director of the designated State unit may request the Commissioner to review such decision. Upon such request the Commissioner shall conduct such a review and shall make recommendations to the Director as to the appropriate disposition of the matter. The Commissioner may not delegate his responsibilities under this paragraph to any officer of the Department of Health, Education, and Welfare who is employed at a position below that of an Assistant Secretary.

APPENDIX B
RCW 74.18.130

RCW 74.18.130 Vocational rehabilitation—Eligibility. The department shall provide a program of vocational rehabilitation to assist blind persons to overcome vocational handicaps and to develop skills necessary for self-support and self-care. Applicants eligible for vocational rehabilitation services shall be persons who are blind as defined in RCW 74.18.020 and who also (1) have no vision or limited vision which constitutes or results in a substantial handicap to employment and (2) can reasonably be expected to benefit from vocational rehabilitation services in terms of employability.

APPENDIX C
34 CFR §§ 361.32, 361.33,
361.39, 361.40 and 361.41

§ 361.32 Evaluation of vocational rehabilitation potential: Preliminary diagnostic study.

(a) *Basic conditions.* The State plan must assure that, in order to determine whether any individual is eligible for vocational rehabilitation services, there is a preliminary diagnostic study to determine:

(1) Whether the individual has a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment; and

(2) Whether vocational rehabilitation services may reasonably be expected to benefit the individual in terms of employability, or whether an extended evaluation of vocational rehabilitation potential is necessary to make this determination.

(b) *Scope of diagnostic study.* The State plan must assure that the preliminary diagnostic study includes examinations and diagnostic studies to make the determinations specified in paragraph (a) of this section. In all cases, the evaluation places primary emphasis upon determining the individual's potential for achieving a vocational goal.

(c) *Specific evaluations.* The State plan must also assure that the preliminary diagnostic study includes an appraisal of the current general health status of the individual based, to the maximum extent possible, on available medical information. The State plan must further assure that in all cases of mental or emotional disorder, an examination is provided by a physician skilled in the diagnosis and treatment of such disorders, or by a psychologist licensed or certified in accordance with State laws and regulations, in those States where laws and regulations pertaining to the practice of psychology have been established.

§ 361.33 Evaluation of vocational rehabilitation potential: Thorough diagnostic study.

(a) *General provision.* The State plan must assure that, as appropriate in each case, when an individual's eligibility for vocational rehabilitation services has been determined, there is a thorough diagnostic study to determine the nature and scope of services needed by the individual. This study consists of a comprehensive evaluation of pertinent medical, psychological, vocational, educational, and other factors relating to the individual's handicap to employment and rehabilitation needs.

(b) *Scope of thorough diagnostic study.* The thorough diagnostic study includes in all cases to the degree needed, an appraisal of the individual's personality, intelligence level, educational achievement, work experience, personal, vocational, and social adjustment, employment opportunities, and other pertinent data helpful in determining the nature and scope of services needed. The study also includes, as appropriate for each individual, an appraisal of the individual's patterns of work behavior, ability to acquire occupational skill and capacity for successful job performance.

§ 361.39 The case record for the individual.

The State Plan must assure that the designated State unit maintains for each applicant for, and recipient of, vocational rehabilitation services a case record which includes, to the extent pertinent, the following information:

(a) Documentation concerning the preliminary diagnostic study supporting the determination of eligibility, the need for an extended evaluation of vocational rehabilitation potential, and, as appropriate, documentation concerning the thorough diagnostic study supporting the nature and scope of vocational rehabilitation services to be provided;

(b) In the case of an individual who has applied for vocational rehabilitation services and has been determined to be ineligible, documentation specifying the reasons for the

ineligibility determination, and noting a review of the ineligibility determination carried out not later than twelve months after the determination was made;

(c) Documentation supporting any determination that the handicapped individual is a severely handicapped individual;

(d) Documentation as to periodic assessment of the individual during an extended evaluation of vocational rehabilitation potential;

(e) An individualized written rehabilitation program as developed under § 361.40 and § 361.41 and any amendments to the program;

(f) In the event that physical and mental restoration services are provided, documentation supporting the determination that the clinical status of the handicapped individual is stable or slowly progressive unless the individual is being provided an extended evaluation of rehabilitation potential;

(g) Documentation supporting any decision to provide services to family members;

(h) Documentation relating to the participation by the handicapped individual in the cost of any vocational rehabilitation services if the State unit elects to condition the provision of services on the financial need of the individual;

(i) Documentation relating to the eligibility of the individual for any similar benefits, and the use of any similar benefits;

(j) Documentation that the individual has been advised of the confidentiality of all information pertaining to his case, and documentation and other material concerning any information released about the handicapped individual with his or her written consent;

(k) Documentation as to the reason for closing the case including the individual's employment status and, if determined to be rehabilitated, the basis on which the employment was determined to be suitable;

(l) Documentation of any plans to provide post-employment services after the employment objective has been

achieved, the basis on which these plans were developed, and a description of the services provided and the outcomes achieved;

(m) Documentation concerning any action and decision involving the handicapped individual's request for an administrative review of agency action or fair hearing under § 361.48; and

(n) In the case of an individual who has been provided vocational rehabilitation services under an individualized written program but who has been determined after the initiation of these services to be no longer capable of achieving a vocational goal, documentation of any reviews of this determination in accordance with § 361.40(d).

§ 361.40 The individualized written rehabilitation program: Procedures.

(a) *General Provisions.* The State plan must assure that an individualized written rehabilitation program is initiated and periodically updated for each eligible individual and for each individual being provided services under an extended evaluation to determine rehabilitation potential. The State plan must also assure that vocational rehabilitation services are provided in accordance with the written program. The individualized written rehabilitation program must be developed jointly by the designated State unit staff member and the handicapped individual or, as appropriate, his or her parent, guardian or other representative. The State unit must provide a copy of the written program, and any amendments, to the handicapped individual or, as appropriate, his or her parent, guardian, or other representative and must advise each handicapped individual, or his or her representative of all State unit procedures and requirements affecting the development and review of individualized written rehabilitation programs.

(b) *Initiation of program.* The individualized written rehabilitation program must be initiated after certification of eligibility under § 361.35(a) or certification for extended

evaluation to determine rehabilitation potential under § 361.35(b).

(c) *Review.* The State must assure that the individualized written program will be reviewed as often as necessary but at least on an annual basis. Each handicapped individual, or, as appropriate, his or her parent, guardian or other representative must be given an opportunity to review the program and, if necessary, jointly redevelop and agree to its terms.

(d) *Review of ineligibility determination.* The State plan must assure that if services are to be terminated under a written program because of a determination that the handicapped individual is not capable of achieving a vocational goal and is therefore no longer eligible, or if in the case of a handicapped individual who has been provided services under an extended evaluation of vocational rehabilitation potential, services are to be terminated because of a determination that the individual cannot be determined to be eligible, the following conditions and procedures will be met or carried out.

(1) This decision is made only with the full participation of the individual, or, as appropriate, his or her parent, guardian, or other representative, unless the individual has refused to participate, the individual is no longer present in the State or his or her whereabouts are unknown, or his or her medical condition is rapidly progressive or terminal. When the full participation of the individual or a representative of the individual has been secured in making the decision, the views of the individual are recorded in the individualized written rehabilitation program;

(2) The rationale for the ineligibility decision is recorded as an amendment to the individualized written rehabilitation program certifying that the provision of vocational rehabilitation services has demonstrated that the individual is not capable of achieving a vocational goal, and a certification of ineligibility under § 361.35(c) is then executed; and

(3) There will be a periodic review, at least annually, of the ineligibility decision in which the individual is given

opportunity for full consultation in the reconsideration of the decision, except in situations where a periodic review would be precluded because the individual has refused services or has refused a periodic review, the individual is no longer present in the State, his or her whereabouts are unknown, or his or her medical condition is rapidly progressive or terminal. The first review of the ineligibility decision is initiated by the State unit. Any subsequent reviews, however, are undertaken at the request of the individual.

§ 361.41 The individualized written rehabilitation program: Content.

(a) *Scope of content.* The State plan must assure that the individualized written rehabilitation program places primary emphasis on the determination and achievement of a vocational goal, and as appropriate includes, but is not necessarily limited to, statements concerning:

(1) The basis on which the determination of eligibility has been made, or the basis on which a determination has been made that an extended evaluation of vocational rehabilitation potential is necessary to make a determination of eligibility;

(2) The long-range and intermediate rehabilitation objectives established for the individual;

(3) The determination of the specific vocational rehabilitation services to be provided in order to achieve the established rehabilitation objectives;

(4) The projected date for the initiation of each vocational rehabilitation service, and the anticipated duration of each service;

(5) A procedure and schedule for periodic review and evaluation of progress toward achieving rehabilitation objectives based upon objective criteria, and a record of these reviews and evaluations;

(6) The views of the handicapped individual, or, as appropriate, his or her parent, guardian, or other representative, concerning his or her goals and objectives and the vocational rehabilitation services being provided;

(7) The terms and conditions for the provision of vocational rehabilitation services including responsibilities of the handicapped individual in implementing the individualized written rehabilitation program, the extent of client participation in the cost of services if any, the extent to which the individual is eligible for similar benefits under any other programs; and the extent to which these similar benefits have been used;

(8) An assurance that the handicapped individual has been informed of his or her rights and the means by which he or she may express and seek remedy for any dissatisfaction, including the opportunity for an administrative review of State unit action, fair hearing or review by the Secretary under § 361.48;

(9) Where appropriate, assurance that the handicapped individual has been provided a detailed explanation of the availability of the resources within a client assistance project established under Section 112 of the Act;

(10) The basis on which the individual has been determined to be rehabilitated under § 361.43; and

(11) Any plans for the provision of post-employment services after a suitable employment goal has been achieved and the basis on which such plans are developed.

(b) *Coordination with education agencies.* When services are being provided to a handicapped individual who is also eligible for services under the Education for Handicapped Children Act, the individualized written rehabilitation program is prepared in coordination with the appropriate education agency and includes a summary of relevant elements of the individualized education program for that individual.